IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 77-1844

CITY OF MOBILE, ALABAMA, *et al.*,

Appellants,

v.

WILEY L. BOLDEN, *et al.*,

Appellees.

No. 78-357

ROBERT R. WILLIAMS, *et al.*,

Appellants,

v.

LEILA G. BROWN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLEES

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SUPPLEMENTAL BRIEF FOR APPELLEES

These two voting rights cases, argued in tandem before the Court on March 19, 1979, were subsequently reinstated on the calendar and are now set for reargument on October 29, 1979. Plaintiffs-appellees, pursuant to Rule 41(5), and in response to the Supplemental Brief filed in City of Mobile, file this supplemental brief to address the following issues raised by events occurring since the original argument:

(1) the impact of this Court's intervening decisions on the lower courts' findings of invidious intent;

(2) the impact of this Court's intervening decisions on the availability of private enforcement of section 2 of the Voting Rights Act;

(3) the latest attempts to procure passage by the Alabama Legislature of laws providing for single-member district elections.

ARGUMENT

I. THE INTERVENING DECISIONS OF THIS COURT GIVE ADDITIONAL SUPPORT TO THE LOWER COURTS' FINDINGS OF INVIDIOUS INTENT

The threshold question in both these appeals is whether this Court will disturb the concurrent factual determinations of purposeful discrimination made by the District Court and Court of

Appeals. If these findings stand, whether this Court grounds its decisions on the Voting Rights Act or the Constitution, it will not be necessary to reach any of the other issues presented by these cases. The principles recently enunciated in Columbus Board of Education v. Penick, 61 L.Ed. 2d 666 (1979); Dayton Board of Education v. Brinkman, 61 L.Ed. 2d 720 (1979); and Personnel Adm'r of Mass. v. Feeney, 60 L.Ed. 2d 870 (1979), applied to the instant cases, compel affirmance of the findings of discriminatory intent.

As in Columbus, 61 L.Ed. 2d at 680, the defendants here do not seriously dispute most of the trial court's subsidiary findings -- historical racial discrimination, current disparities in the provision of public services to blacks, racial tactics that deny blacks' choices a realistic chance of election, lawmakers' courtroom admissions of racial motives and bad faith. Rather, they challenge the factual inferences which the lower courts may draw from these facts.

This Court has reaffirmed its practice of giving special deference to the findings of "the judges who have lived with the case over the years." Columbus, supra, 61 L.Ed. 2d at 676 n.6. The replacement of "blatant" disenfranchisement devices with more subtle forms of discrimination and the "coldness and impersonality of a printed record" mean that federal trial judges are

"uniquely situated ... to appraise the societal forces at work in the communities where they sit." Id. at 685 (Stewart, J., concurring), 683 (Burger, C.J., concurring). Such considerations give an added force to this Court's two-court rule in these cases. See Columbus, supra, 61 L.Ed. 2d at 684-88 (Stewart, J., concurring).

Feeney lays to rest the principal contention of the Mobile defendants in both the District Court and Court of Appeals -- that Washington v. Davis, 426 U.S. 229, (1976) requires proof of invidious intent at the time of a challenged law's enactment. Legislation innocent in its origins is nevertheless constitutionally offensive if it is "subsequently reaffirmed" or "subsequently re-enacted" for an invidious purpose. Feeney, supra, 60 L.Ed. 2d at 886, 888. Thus the courts below did not misinterpret Davis when they looked past the allegedly "race-proof" beginnings of the city and school board election plans to see if they had been maintained in later years for racial reasons.

The factual findings of intent in the instant cases have even stronger evidentiary underpinnings than those in Columbus and Dayton. Here we have "contemporaneous explanation[s]" that racial discrimination was "one objective" in the State's refusal to authorize single-member districts for Mobile's city government and school board. This is the "best evidence" the dissenters in Columbus

found wanting in that case. 61 L.Ed. 2d at 709 (Rehnquist, J., dissenting). Black and white legislators gave unrebutted testimony that the probability of blacks getting elected kept the local delegation from approving single-member district proposals for the City of Mobile in 1965 and 1976. The district court squarely held that these racial considerations "prevented any effective redistricting which would result in any benefit to the black voters". City of Mobile J.S. 30b; Williams J.S. 35b, App. 33a.

The courts below did not, as appellants urge, base their findings of intent merely on legislative "awareness of consequences". Those courts properly relied in part on direct objective and circumstantial evidence of the laws' underlying purposes. They also considered the "foreseeable consequences" of the election plans as relevant to, but not controlling of, the motivation inquiry. See City of Mobile J.S. 30b. Attaching weight to the foreseeable consequences of state action was expressly sanctioned by Columbus. 61 L.Ed. 2d at 681; see also id. at 712 (Rehnquist, J., dissenting).

In addition to the lower courts' findings of present discriminatory intent, there is a distinct alternative ground, recognized by Columbus and Dayton, for upholding the judgments in the instant

appeals. The State of Alabama may not "knowingly [continue] its failure to eliminate the consequences of its past intentionally segregative policies" regarding voting rights. See Columbus, supra, 61 L.Ed. 2d at 679. In these cases, there is no serious dispute that, at least from 1901 to 1965, the State did everything in its power to exclude blacks altogether from the election processes. The District Court found that those official discriminatory policies shared direct responsibility for the racial attitudes in Mobile's electorate that produce bloc voting by whites and thus result in dilution of black voting strength through the local at-large election plans. City of Mobile J.S. 20b-21b, 38b-39b. The teaching of Columbus and Dayton that states may not perpetuate past official racism by use of neutral school laws or practices provides direct support for the analogous principle in the realm of voting rights. See Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977).

II. THE INTERVENING DECISIONS OF THIS COURT CONFIRM THE EXISTENCE OF A PRIVATE CAUSE OF ACTION TO ENFORCE SECTION 2 OF THE VOTING RIGHTS ACT

This Court recently reiterated its adherence to the practice of first disposing of statutory

claims before reaching constitutional issues. New York City Transit Authority v. Beazer, 59 L.Ed. 2d 587, 600 (1979). The lower court's failure to pass on the statutory claims will not deter this Court from doing so. Id. at 601 n.24. Plaintiffs-Appellees in both City of Mobile and Williams have throughout this litigation asserted claims for relief under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. See Bolden Appellees' Brief, pp. 11-12; Brown Appellees' Brief, pp. 11-12. Even though neither the District Court nor the Court of Appeal based its judgment on this statutory ground, intervening decisions of this Court leave no doubt that plaintiffs have a cause of action under § 2, and this Court ought to address it, particularly when doing so will avoid the necessity of reaching the constitutional issues.

The standards explicated and applied in three of this Court's decisions last term compel the conclusion that a private cause of action should be implied under § 2 of the Voting Rights Act. Touche Ross and Co. v. Reddington, 61 L.Ed. 2d 82 (1979); Cannon v. University of Chicago, 60 L.Ed. 2d 560 (1979); Chrysler Corp. v. Brown, 60 L.Ed. 2d 208 (1979). Cannon, construing § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, is indistinguishable from the

instant case. Section 2 of the Voting Rights Act, like Title IX of the Education Amendments of 1972, "presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present." 60 L.Ed. 2d at 587. Both statutes were enacted for the benefit of a special class, id. at 571, and both employ "the right- or duty-creating language [which] has generally been the most accurate indicator of the propriety of implication of a cause of action." Id. at 571 n.12. Indeed, Cannon refers directly to the special class of black citizens protected by section 2, and to this Court's earlier decision finding a private right to relief under its sister provision, section 5. Id. at 571, citing Allen v. State Bd. of Elections, 393 U.S 544 (1969). Thus § 2 prohibits certain conduct and creates federal rights in favor of private parties in precisely the manner contemplated by Cannon and Cort v. Ash. Cannon, 60 L.Ed. 2d at 572 n.13; Cort v. Ash, 422 U.S. 66 (1975).

In our initial briefs we argued that section 2 of the Voting Rights Act incorporates the same "purpose or effect" standard found in section 5. The Appellants in City of Rome v. United States, No. 78-1840, urge that section 5 does not prohibit electoral devices which have a discriminatory effect but no invidious purpose. The legislative history of the Voting Rights Act reveals that early versions of some sections referred solely to discriminatory "effect" or only to discriminatory "purpose",[1/] but that in every case

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1/ As originally drafted section 5 applied to practices with a discriminatory effect, but not a discriminatory purpose. S. 1564, § 8, 111 Cong. Rec. 28358. It was broadened to include both by the Senate Judiciary Committee. 111 Cong. Rec. 28360.

Section 4, which describes when a jurisdiction can remove itself from coverage of section 5, initially referred to denials of the right to vote "by reason of race". S. 1564, 111 Cong. Rec. 28358. It was changed by the Senate Committee to refer to tests or devices used "for the purpose" of denying the right to vote "on account of race", S. 1564, § 4(a), 111 Cong. Rec. 28360, but was modified on the floor to include discriminatory effect. 111 Cong. Rec. 28365.

The pocket trigger in section 3(b) referred to discriminatory purpose in the Senate version, 111 Cong. Rec. 28360, but the House bill included discriminatory effect as well and that version was adopted by the Conference Committee. 111 Cong. Rec. 28370; H. Rep. No. 711, 89th Cong., 1st Sess., p. 1.

Challenges by the Attorney General to the use of tests or devices by jurisdictions which had bailed out under section 4 at first were required to show discriminatory purpose, 111 Cong. Rec. 28360, but this too was amended to cover discriminatory effect. Id. at 28365, 28370.

Congress redrafted the section to cover both purpose and effect. Whenever Congress spelled out the relevant evidentiary standard under the Voting Rights Act, it refused to exclude either discriminatory purpose or discriminatory effect. This uniform determination to reject either form of limitation on the scope of the Act confirms the established construction of section 5. Had Congress believed that section 2 itself was limited to either "purpose" or "effect", that provision too would doubtless have been amended; at the very least one of the successful proponents of the broader language would have voiced some objection to such a limitation in section 2.

III. SINGLE-MEMBER DISTRICT LEGISLATION IN THE 1979 ALABAMA LEGISLATURE

On July 2, 1979, black Mobile County Representative James E. Buskey introduced H. 951 in the 1979 Regular Session of the Alabama Legislature. The bill proposed an optional mayor-council form of government with single-member districts for cities Mobile's size, to be adopted upon approval by the city's voters in a mandatory referendum election. Pursuant to the Legislature's practice with respect to local bills, it was referred to House Local Legislation Committee No. 3, where it was discussed by Mobile's local delegation. A substitute bill was reported out of

committee which amended Buskey's bill in two important respects: (1) the referendum election would be held only if "the ultimate judicial test of the constitutionality of [Mobile's] present form of government [should] find against the At-Large Commission form," and (2) in such event, the voters could choose either a "district commission" government, with three city commissioners elected from single-member districts, or a mayor and nine single-member district council members. Under the commission option, the three successful candidates would, after the election, choose and distribute among themselves the executive responsibilities for three separate departments, finance and administration, public safety, and public works and services. Each commissioner-department head's powers would be subject to "the direction, and supervision of the board of commissioners as a whole." Subst. H.B. 951, § 20.

At the urging of Mobile County's three black representatives, the bill was amended to strike the condition of judicial proscription of the at-large form of government and to require holding the referendum election within 50 days after its enactment. The bill passed the House, but it died on the Senate calendar when white Mobile legislators in both houses exercised their local

courtesy prerogatives and withdrew the needed unanimous support.

This history demonstrates once again the racial nature of this issue within the Alabama legislature. It also illustrates that the Legislature understands, as do we, that the district court opinion in the instant case permits the use of a modified version of the commission form of government.

As we noted in our principle brief, the white-controlled Mobile County School Board repeatedly represented to the trial court that it supported and would propose legislation creating single-member school board districts. Brown Appellees' Brief, p. 31, n.27. During the 1979 Session, as in every other session of the Legislature since the completion of the trial in 1976, the School Board again declined to propose such a bill. This further supports the district court's conclusion that the Board had acted in bad faith.

CONCLUSION

For the above reasons the opinions of the courts below should be affirmed.

Respectfully submitted,

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